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U.S. DISTRICT COURT
DISTRICT OF NEVADA

12 ANTHONY LUCAS, GREGORY H.
13 CASTELLO, LILLIAN MELTON, LEAVON
14 R. SMITH, ROBERT A. GREENE, JAMES
15 A. BIGGS, LARRY DUTCHER, WILLIAM
16 C. SACK, DONALD A SPEARCE, MERRILL
17 L. CLAIR, BRADLEY J. EDWARDS, and
18 LISA MEDFORD on behalf of themselves and
19 all others similarly situated,

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Plaintiff(s)

vs.

18 BELL TRANS, a Nevada Corporation; BELL
19 LIMO, a Nevada corporation; and
20 WHITTLESEA-BELL CORPORATION, and
21 Does 1-50, inclusive,

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Defendant(s)

CASE NO. 2:08-CV-01792-RCJ-RJJ

**DEFENDANTS' RESPONSE TO
PLAINTIFFS' MOTION FOR
CIRCULATION OF NOTICE OF THE
PENDENCY OF THIS ACTION
PURSUANT TO 29 U.S.C. 261(B) AND
OTHER RELIEF WITH
MEMORANDUM IN SUPPORT
THEREOF**

I. INTRODUCTION

Plaintiffs' Motion for Circulation is premature and should be denied, since the number of eligible "opt in" drivers will be very minimal - much less than Plaintiffs now realize, and ultimately, the minimal number of eligible drivers will not justify a collective action. This is so

1 because many, if not all, of the drivers Plaintiffs now contend are eligible to opt in, have always
2 been, and continue to be, exempt from the FLSA's overtime requirements. The vast majority of
3 Bell Trans' drivers have always driven vehicles weighing over 10,000 pounds and drive
4 passengers on "through tickets" or drive passengers outside of Nevada.
5

6 The "class" Plaintiffs define excludes "all limousine drivers employed by Defendant[s]
7 who didn't drive interstate and who didn't drive local passengers on 'through tickets' where the
8 ultimate destination for the passenger was out of state." That definition of "through tickets",
9 however, is incomplete. The "through ticket" more likely originates outside the state of
10 Nevada, with Nevada as the destination; or originates in Nevada, with another state or foreign
11 country as the destination; or be a round trip "ticket." The critical element is the driver's role in
12 transporting the passenger in interstate or foreign commerce, either directly or by virtue of a
13 "through ticket."¹
14

15 **II. MEMORANDUM OF POINTS AND AUTHORITIES**

16 A. Defendants' Interstate Services - Limousines / Buses Are Exempt From Overtime 17 Pay Requirements

18 The Declaration of Brent Bell, Exhibit A,² to this Response, states that including
19 the period from August 10, 2005 to June 6, 2008, no less than sixty-nine percent (69%) of
20 Defendants' drivers operated limousines; and buses weighing more than ten thousand (10,000)
21 pounds, transporting passengers in interstate commerce, utilizing "through ticket" travel
22 documents and charters.
23

24
25 ¹For example, from Nevada to a Native American or federal destination, i.e. golf course,
26 casino or military base; or another state. Some "through tickets" may be one way. Others may be
27 round trip.

28 ²Should Defendants move for summary judgment later in this proceeding, admissible
evidence will be provided to support Exhibit A.

1 Accordingly, in view of the substantial percentage of Defendants' drivers engaged in
2 interstate commerce, they are all exempt from FLSA overtime pay requirements. (49 U.S.C.
3 §31502; 29 U.S.C. §207). See Tews v. Renzenberger, 392 F.Supp.2d 1331 (D.C. Kansas, 2009),
4 for a well reasoned analysis of the Motor Carrier Act Exemption as applied in the context of the
5 August 10, 2005 SAFETEA-LV narrowing of the exemption to apply only to "commercial motor
6 vehicles weighing "at least 10,001 pounds," and the June 6, 2008 amendment which deleted the
7 "at least 10,001 pounds" requirement and reverted to the pre-August 10, 2005 criteria.

8
9 All drivers employed during that time frame and thereafter were required to have
10 Commercial Drivers Licenses ("CDL"), a prerequisite to driving Defendants' buses.

11
12 Defendants believe circulation of notice of an "opt in" collective class of limousine
13 drivers is premature in that the number of persons who are eligible for overtime may not justify
14 more than a simple joinder. (Fed.R.Civ.P. 20)

15 Further, Plaintiffs' declared intention to attempt to persuade this Court that a Rule 23 "opt
16 out" class action is appropriate for litigation of claims asserted under Nevada law, ignores the
17 novel issues and complexities addressed during proceedings initiated and resolved in respect to
18 Defendant Bell Trans Motion to Dismiss the initial Complaint (Order, entered June 24, 2009).
19 Defendants will revisit the novelty and complexities in the Points and Authorities that follow.

20
21 B. The State Law Claims - Minimum Wage / Overtime

22 Plaintiffs concede the Motor Carrier Act provides an exemption from required
23 overtime payments under 29 U.S.C. §207 for drivers of limousines who satisfy the interstate
24 commerce test. However, Plaintiffs persist in their efforts to claim overtime and minimum
25 wages, notwithstanding the Order issued by this Court on June 24, 2009 (Order, p. 9:12-15).
26 That Order states:
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28

1 “In sum this Court cannot conclude that there is no other
 2 reasonable construction of the [Constitutional] amendment than
 3 that it repealed NRS 608.250 . . . Because the NWHL expressly
 4 states it does not apply to taxicab and limousine drivers, the
 5 limousine Plaintiffs cannot sue for violation of unpaid minimum
 6 wages. NRS 608.250(e).” (Emphasis added)

7 “For the reasons explained in connection with Nevada minimum
 8 wages, the Court hold[s] that the exceptions found in NRS 608.250
 9 relied upon in NRS 608.018, are still in force notwithstanding the
 10 Amendment. Because the Limousine Plaintiffs fall within the
 11 express exceptions for Nevada’s overtime compensation statute,
 12 they cannot bring a claim for unpaid overtime under Nevada law.”
 13 (Id. p. 14:5-9)

14 C. The Nevada Claims Implicate 28 U.S.C. §1367

15 Defendants acknowledge this Court’s jurisdiction over the FLSA claims, which
 16 includes the power to enforce the overtime exemptions under the Motor Carrier Act (Id.). The
 17 exercise of supplemental jurisdiction over the Nevada claims, however, requires in depth
 18 analysis.

19 1) Supplemental jurisdiction is addressed in reasonable detail by 28 U.S.C.
 20 §1367. Where state claims “are so related to claims in the action within such original jurisdiction
 21 that they form a part of the same case or controversy under Article III of the United States
 22 Constitution,” assertion of jurisdiction by the federal court is favored. (Id. (a)). On the other
 23 hand, “(c) The district courts may decline to exercise supplemental jurisdiction over a claim
 24 under subsection (a) if

25 “(1) the claim raises a novel or complex issue of
 26 state law, . . . [or] (4) in exceptional circumstances,
 27 there are other compelling reasons for declining
 28 jurisdiction.”

29 In Ansoumana v. Greslede’s Operating Corp., 201 F.R.D. 81 (S.D. N.Y.,
 30 2001), Plaintiffs sued under the FLSA for unpaid minimum wages, overtime; and state claims

1 under the New York Minimum Wage Act; and injunctive relief. Plaintiffs sought certification of
2 the federal claims as a “collective action”; and Federal Rule 23 class certification with respect to
3 their New York minimum wage claims. Following a detailed and reasoned analysis, the Court
4 found the combining of the Collective Action in the same case with the Rule 23 Class Action
5 would be manageable, because of the commonality of the claims and claimants.
6

7 Nevertheless, Ansoumana, id. highlights reasons why exercise by this
8 Court of supplemental jurisdiction should be declined.

9 D. The Nevada Claims Raise Both Novel And Complex Issues

10 1) The Nevada Supreme Court and this Court have held there is no right to a
11 private civil action to collect minimum wages or overtime required by Nevada law. The
12 exclusive forum is the Nevada Labor Commissioner. Baldonado et al v. Wynn Las Vegas, LLC,
13 194 P.3d 96 (2008).
14

15 2) Limousine drivers are exempt by Nevada statutes from minimum wage
16 and overtime requirements. NRS 608.018 and 608.250.
17

18 3) Given Nevada law which has blanket exemptions for limousine drivers
19 from minimum wage and overtime requirements, and federal law, the Motor Carrier Act, *id.*,
20 which exempts drivers of “motor carriers” in interstate commerce, from FLSA required overtime,
21 the only basis for Plaintiffs’ claims is FLSA minimum wage requirements, which permit tips to
22 be included in computing minimum wage.³ 29 U.S.C. §203(m).
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26 ³In view of the Motor Carrier Act and Nevada’s exemptions from overtime, plus 29 U.S.C.
27 §203 permitting tips to be credited to the employer in calculating minimum wage requirements, it
28 is unlikely Plaintiffs’ claims limited to those who consent (“opt in”), will be numerous enough to
warrant a “collective action.”

1 E. Plaintiffs' Request That The Statute of Limitations Be Tolloed Should Be Denied

2 "Equitable tolling, is to be invoked only in rare circumstances." (Citations
3 omitted).

4 "Equitable tolling is to be invoked only in rare circumstances."

5 "Equitable tolling, if available at all, is the exception rather than the rule . . ."

6 "The Plaintiffs have not alleged any extraordinary circumstances . . . nor have they
7 pointed to any wrongdoing by the Defendants that would justify a tolling order."

8 See, Groshek v. Babcock and Wilcox, 425 F.Supp, 232 (1977); Vistamar v.
9 Fagundo-Fagundo, 430 F.3d 66 (1st Cir. 2005)

10 F. A Rule 23 Class Action Is Not Compatible With An FLSA Collective Action

11 See DeAsencio v. Tyson Foods, Inc., 342 F.3d 302, 306 (3d Cir. 2003)("Courts
12 have generally recognized that Rule 23 class actions may not be used under FLSA §16(b)."

13 **III. CONCLUSION**

14 In view of the Motor Carrier Act, exemption from federal overtime pay requirements,
15 which clearly apply to Defendants' interstate transportation services, Plaintiff drivers have no
16 viable claims under federal law for alleged overtime wage violations.

17 Similarly, Plaintiffs cannot proceed under Nevada law or under the FLSA as a Rule 23
18 class, because Nevada's overtime requirements do not apply to limousine drivers. Hence,
19 Plaintiffs must look to the FLSA for relief, but will look in vain. What may be left, which
20 Defendants do not concede, is an FLSA minimum wage claim which requires each claimant to
21 file a written consent, "opt in," and credit Defendants with tips toward the minimum wage.


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1 In view of the foregoing, Plaintiffs' Motion and requests set forth therein should be
2 denied.

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5 DATED: August 28, 2009

Respectfully submitted,

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CERTIFICATE OF MAILING


I hereby certify that on the 28th day of August, 2009, I served a true and correct copy of
**“DEFENDANTS’ RESPONSE TO PLAINTIFFS’ MOTION FOR CIRCULATION OF
NOTICE OF THE PENDENCY OF THIS ACTION PURSUANT TO 29 U.S.C. 261(B)
AND OTHER RELIEF WITH MEMORANDUM IN SUPPORT THEREOF”** by:

X serving the following parties electronically through CM/ECF as set forth below;

_____ faxing a copy to the numbers below;

_____ depositing a copy in the United States mail, first class postage fully prepaid to the
persons and addresses listed below:

Mark R. Thierman
Thierman Law Firm, P.C.
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Reno, Nevada 89511
laborlawyer@pacbell.net


An Employee of Norman H. Kirshman, P.C.

**BELL
DECLARATION
EXHIBIT “A”**

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13 Attorney for Defendants

14 U.S. DISTRICT COURT

15 DISTRICT OF NEVADA

16 ANTHONY LUCAS, GREGORY H.)
 17 CASTELLO, LILLIAN MELTON, LEAVON)
 18 R. SMITH, ROBERT A. GREENE, JAMES)
 19 A. BIGGS, LARRY DUTCHER, WILLIAM)
 20 C. SACK, DONALD A. SPEARCE, MERRILL L.)
 21 CLAIR, BRADLEY J. EDWARDS, and LISA)
 22 MEDFORD on behalf of themselves and all others)
 23 similarly situated,)

24 Plaintiffs,)

25 vs.)

26 BELL TRANS, a Nevada Corporation; BELL)
 27 LIMO, a Nevada Corporation; and WHITTLESEA-)
 28 BELL CORPORATION, and Does 1-50, inclusive,)

Defendants.)

CASE NO. 2:08-CV-01792-RCJ-RJJ

**DECLARATION OF
BRENT BELL**

29 I, Brent Bell, hereby declare and state:

30 1. I currently serve as the President of Bell Trans, and have served as President since
 31 2002. From 1997 to 2002 I served as Chief Operating Officer of Bell Trans. From 1993 to 1997 I
 32 served as Operations Manager of Bell Trans. During my tenure since 1993, I have taken an active,
 33 hands on role in establishing policies and practices for Bell Trans drivers.

34 ///

1 2. Bell Trans is a Nevada transportation company that provides transportation to the
2 riding public via buses and limousines.

3 3. Bell Limo is a sister company to Bell Trans that is located in Reno, and only operates
4 approximately 18 limousines.

5 4. Beginning in August of 2005 and continuing through the present day, Bell Trans owns
6 and operates approximately 225 limousines, and approximately 120 buses.

7 5. When I took over as Operations Manager in 1993, I immediately realized we did not
8 have a sufficient number of drivers who were qualified to drive Bell Trans buses since to drive one
9 of our buses you must have a commercial driver's license ("CDL").

10 6. Therefore, I immediately instituted a policy whereby all newly hired drivers must
11 possess a CDL. Ultimately, this gave me the flexibility to assign any driver to a bus or limousine -
12 whatever was needed.

13 7. I now understand that for purposes of this lawsuit that the time period between
14 August 10, 2005 and June 6, 2008 is a critical time period, hereinafter "the relevant time period,"
15 and that certain information during the relevant time period is of particular importance. Below I will
16 present facts concerning Bell Trans, its vehicles, and its drivers

17 8. During the relevant time period each of Bell Trans' limousines weighed less than
18 10,000 pounds, and in fact they still do today.

19 9. During the relevant time period each of Bell Trans' buses weighs more than 10,000
20 pounds, and in fact they still do today.

21 10. During the relevant time period, Bell Trans employed a total of 1,319 drivers.

22 11. During the relevant time period, at least 98% of Bell Trans' drivers possessed a CDL;
23 and could and did drive limousines or buses, as needed.

24 12. During the relevant time period, at least 69% of Bell Trans' drivers routinely drove
25 buses as part of their responsibilities, and in particular, transported passengers that were part of a
26 "through ticket" - either to or from the airport.

27 13. In preparation for this Declaration, I personally reviewed the following documents
28 comprised of tripsheet data used to generate payroll from August 10, 2005 to June 6, 2008. I

1 discussed the information set forth in this Declaration with Paul Balderelli, Controller, and am
2 satisfied the information is accurate.

3 I declare under the penalty of perjury under the laws of the State of Nevada that the foregoing
4 declaration is true and correct, and if called upon to testify, would do so.

5 Dated this 28th day of August, 2009.

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8 BRENT BELL
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